

**COURT OF APPEALS
DECISION
DATED AND FILED**

August 5, 2014

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2013AP2682

Cir. Ct. No. 2012SC176

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

WARREN KING AND KEVIN KING,

PLAINTIFFS-RESPONDENTS,

V.

BRIAN R. KING,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Rusk County:
STEVEN P. ANDERSON, Judge. *Affirmed in part; reversed in part, and cause remanded with directions.*

¶1 HOOVER, P.J.¹ Brian King appeals a small claims judgment entered in favor of his brothers, Warren King and Kevin King.² Brian argues the

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2). All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

circuit court erroneously exercised its discretion by failing to allow him to present evidence, examine witnesses, and make arguments at the 2012 and 2013 court hearings. He also argues there was insufficient evidence to support the circuit court's factual findings and the circuit court erred by failing to conclude Kevin's claims were barred by the statute of limitations.

¶2 We conclude that, at the 2012 hearing, the circuit court allowed Brian to present evidence, examine witnesses, and make argument, and the factual findings made by the circuit court following that hearing are sufficiently supported by the record. We therefore affirm the portion of the circuit court's judgment ordering Brian to return Warren's property. However, we agree with Brian that, at the 2013 hearing, the circuit court erred by making its determinations before providing Brian with any opportunity to make argument or present a defense to the allegations. We therefore reverse the remainder of the circuit court's judgment and remand with directions that Brian be provided an opportunity to make argument and present a defense to the remaining allegations.

BACKGROUND

¶3 Warren and Kevin brought the present small claims action against Brian. Warren alleged that he had loaned to Brian, for use in Brian and Kevin's business, an aluminum brake, one section of aluminum scaffolding, and a 1995 Hudson flatbed trailer with two spare tires. Warren contended Brian refused to return his property. Kevin alleged that he was entitled to \$2,000 and a Wacker

² Because the parties share the same last name, we will refer to the parties by their first names for clarity.

plate compactor³ as compensation for labor that Kevin performed and for which Brian refused to pay. Brian, pro se, denied the allegations, and the court scheduled a trial.

¶4 The court held a small claims hearing on October 4, 2012. At the hearing, Warren, who does construction work, testified that, in 2003, he acquired the Hudson flatbed trailer with two spare tires from Nickolson Construction, Inc. The bill of sale, which was admitted into evidence, indicated that Warren purchased the trailer for \$3,000. At the time of purchase, Warren knew his brothers, Brian and Kevin, had recently started a business called King's Northland Enterprises, Inc. Warren offered his brothers use of his trailer for their business on the conditions that they title and license it, insure it, and be responsible for all maintenance. Warren testified that he never gifted or sold the trailer to Brian, Kevin, or King's Northland.

¶5 Warren also testified that, in approximately 2005, he loaned to Brian and Kevin for use in King's Northland an aluminum brake⁴ and two sections of aluminum scaffolding. Warren asked Brian to return the brake and one section of scaffolding—the other section was in Kevin's possession. Brian told Warren that “he didn't know anything about it. He said that it was gone and it's not around any longer.” Warren testified Brian was the last person in possession of the brake and section of scaffolding. The brake and scaffolding were both used and worth

³ The small claims complaint indicated that Warren was requesting Brian to return the Wacker plate compactor. However, it was established at the small claims hearing that Kevin, not Warren, was making this request.

⁴ Warren explained that an aluminum brake is used for “bending aluminum sheet metal for soffit, fascia, [and] window caps[.]”

approximately \$1,250, and \$400 or \$500, respectively. During cross-examination, Warren conceded he had no documentation with him proving he owned the aluminum brake and scaffolding.

¶6 Kevin testified he and Brian were fifty percent owners of King's Northland. In 2006, a fourth brother, Ronald King, hired King's Northland to help build his house. Ronald paid King's Northland in tools and wrote a \$4,233 check to Brian for labor. Kevin testified that the Wacker plate compactor represented approximately half of the total value of the tools Ronald paid to King's Northland. Because King's Northland no longer existed, Kevin reasoned that he should receive the plate compactor as his share of the tools from Ronald. Kevin also testified that Brian never paid him \$2,000 from Ronald's check, which he asserted was his share of the labor.

¶7 During Kevin's cross-examination, Brian and the court engaged in a dialogue. When the court asked about the arrangement for compensation, Brian told the court that "[w]e would write a check for salaries when we had money in the account." When the court asked how the company was dissolved, Brian told the court that Kevin individually billed a client when the work should have been billed by the company and, in response, Brian told Kevin they were "done doing business" and "we just shut the doors."

¶8 Brian advised the court that, after the business was closed, Kevin and their father came to Brian's workshop when Brian was out of town and took various tools and pieces of equipment. At that point, Kevin interjected and told the court that he and their father only took equipment belonging to Kevin or their father.

¶9 The court told Brian it wanted to see the corporate records. It explained the corporation's tax records would settle this lawsuit because the records would show what property the corporation owned. Brian advised the court he had no corporate records.

¶10 Brian then told the court that the present lawsuit actually had nothing to do with the equipment. He explained the real dispute involved a real estate transaction. According to Brian, he and Kevin divided up a parcel of land they both owned, Kevin "decided to buy [Brian] out[,] and, after the transaction occurred, it was discovered the title company erred because Brian still owned half of the property. Brian stated that his family believed he had "planned ... this mess" and began "threatening" him. Kevin told the court he never threatened Brian to get him to sign the papers regarding the property.

¶11 Ronald testified he hired his brothers to help him build a house. Ronald paid Brian and Kevin with various tools, including a new plate compactor. Ronald did not know if the plate compactor would be equal to the value of all of the other tools and equipment, but he stated "it would be right in that ballpark." Ronald also wrote a check to Brian for Brian's and Kevin's labor. Ronald explained that, although he made the check out to Brian personally, "it was the corporation doing the work. From past experience it didn't matter who you wr[o]te it to because it all goes into the corporate account."

¶12 Brian testified he purchased the Hudson flatbed trailer from Warren for \$2,000 cash but had no record of that transaction. He testified he did not have any of the equipment in his possession because it was taken by his family while he was out of state. As for the Wacker plate compactor, Brian testified he was not in possession of a Wacker plate compactor, but he was in possession of the one from

his brother Ronald for the work done on the house, which was a Makita plate compactor. Brian did not believe Kevin was entitled to the plate compactor because Kevin “ransacked the shop” and had already taken more than fifty percent of the corporate assets. Brian also did not believe that Kevin was entitled to \$2,000 for doing work on Ronald’s house.

¶13 The circuit court granted judgment in favor of Warren for his claims for the brake, the scaffolding, and the trailer. The court reasoned that Warren had documentary proof that he purchased the trailer for \$3,000 from Nicholson. The court found that Warren then allowed King’s Northland to use the trailer. Although the court noted that Brian testified that he paid \$2,000 for the trailer, it stated, “There is no documentation to the court. There is no[] bill of sale. There are no corporate records that indicate that it is a corporate asset.” The court also found that the aluminum brake and scaffolding belonged to Warren, Warren allowed King’s Northland to use this equipment, and Warren was entitled to its return. It concluded that Brian had thirty days to return the aluminum brake or a monetary judgment of \$1,250 would be entered against him.

¶14 As for Kevin’s claims, the court found that King’s Northland was a separate, recognized entity in which Brian and Kevin were equal owners. It found that Brian “unilaterally ceased operations by shutting the doors.” The court noted that, when Brian shut down the corporation, he failed to do any accounting or conduct any steps to dissolve the corporation. It stated,

[B]efore I rule on those questions or whether [Kevin] gets the plate compactor and the \$2,000[,] I want to see whether – because it is uncontroverted that the work done for Ronald was work done by King’s Northland Enterprises Incorporated. Ronald paid King’s Northland Enterprises Incorporated.

....

Ordinarily when you pay a corporation, you don't split the funds up. I think Brian is right there. He got or allegedly got \$4,300. It goes into an account to pay the electric bill. It pays the heat. It makes the truck insurance payment. It does that kind of stuff and then the share holders, officers, employees take a draw or salary.

The court reasoned that, in the end, all that may be required for Kevin's claims was that the corporation needed to be dissolved and an accounting needed to occur. The court did not make a decision on Kevin's claims.

¶15 The circuit court did not issue a judgment following the small claims trial. Approximately one year later, in September 2013, Warren and Kevin brought a motion, noting in part that a judgment had never been entered. Warren and Kevin alleged Brian had failed to return Warren's equipment as required by the court and asked the court to enter a \$1,250 monetary judgment. They also asked the court to enter a judgment in favor of Kevin for \$2,000 and the plate compactor.

¶16 The court held a hearing on October 17, 2013. After Warren's and Kevin's counsel made his argument, but before Brian was given an opportunity to make an argument or present a defense, the circuit court "order[ed] that the request by the plaintiffs be granted." Brian interjected, saying he "would like to speak before this is final." Brian began telling the court that Kevin was a fifty-percent owner in the corporation, that all of this occurred almost nine years ago, and that he never had a problem with his brothers until they had an argument over the real estate transaction. The court stopped Brian and told him he was "responsible to give the other principles ... the \$1,250" plus \$2,000 and the plate compactor. When Brian tried to tell the court that he had attempted to return Warren's equipment and Warren refused, the court directed Warren's and Kevin's counsel to draft the judgment against Brian. When Brian tried to tell the court the plate

compactor was sold to pay the corporation's back bills, the court went into recess. Brian appeals.

DISCUSSION⁵

¶17 On appeal, Brian, now represented by counsel, argues the circuit court erroneously exercised its discretion “by failing to allow [Brian] to present evidence, examine witness[es], and make argument.” He also argues there was insufficient evidence to support the circuit court’s factual findings.

¶18 “A circuit court erroneously exercises its discretion if it applies an improper legal standard or makes a decision not reasonably supported by the facts of record.” *260 N. 12th St., LLC v. DOT*, 2011 WI 103, ¶38, 338 Wis. 2d 34, 808 N.W.2d 372. Further, “[a] circuit court’s factual findings will not be set aside unless they are clearly erroneous.” WIS. STAT. § 805.17(2). “[A] finding of fact is clearly erroneous when ‘it is against the great weight and clear preponderance of the evidence.’” *Phelps v. Physicians Ins. Co. of Wis., Inc.*, 2009 WI 74, ¶39, 319 Wis. 2d 1, 768 N.W.2d 615 (quoted source omitted).

¶19 Brian’s appellate arguments regarding the circuit court’s alleged errors encompass both the 2012 and the 2013 hearings. We begin our discussion by reviewing the 2012 hearing. The record reflects that, at the 2012 small claims hearing, the circuit court allowed Brian to present evidence, examine witnesses and make argument. The isolated incidents that Brian emphasizes in his brief

⁵ The briefs filed by both parties in this case were confusing, unorganized and largely conclusory, causing a waste of judicial time and resources. We admonish both parties’ counsel that the court of appeals is a high-volume, error-correcting court, and that we will not overlook counsels’ abysmal briefing in the future. See *State v. Pettit*, 171 Wis. 2d 627, 647, 492 N.W.2d 633 (Ct. App. 1992).

from the 2012 hearing do not support Brian's argument. His examples are also not reflective of the extraordinary patience the court exhibited when the court allowed Brian to tell it in detail about an unrelated real estate transaction and about the various times his family members allegedly broke into his workshop and removed equipment. This testimony was allowed despite the fact that, as the court noted, Brian never counterclaimed for the alleged thefts. We conclude the circuit court did not erroneously exercise its discretion in regard to the 2012 hearing.

¶20 Further, the circuit court's factual determinations from the 2012 hearing are supported by the record and not clearly erroneous. The circuit court found, based on Warren's testimony and the bill of sale for the trailer, that Warren owned the trailer, brake, and scaffolding, that Warren allowed Brian and Kevin to use his property, that Brian was the last person in possession of Warren's property, and that Warren was entitled to the return of his property. Although Brian testified otherwise, credibility determinations are for the circuit court. *See Cogswell v. Robertshaw Controls Co.*, 87 Wis. 2d 243, 250, 274 N.W.2d 647 (1979) (When the court is the trier of fact, it is the ultimate arbiter of witness credibility.). We therefore affirm the part of the circuit court judgment ordering Brian to return Warren's trailer and other property.

¶21 As for Kevin's claims, at the 2012 hearing, the circuit court found that the plate compactor and the \$2,000 represented Kevin's share of the work that was completed on Ronald's house. The court also found that, as a co-owner of King's Northland, Kevin's share was not necessarily a salary draw and was subject to, along with Brian's share, any corporate debt. These factual findings are supported by the record and not clearly erroneous. *See* WIS. STAT. § 805.17(2).

¶22 We next turn to the 2013 hearing. We agree with Brian that, at the 2013 hearing, the circuit court made its determinations and entered judgment against Brian without giving Brian an opportunity to offer an explanation for his purported failure to return Warren’s property or present a defense in support of his assertion that Kevin was not entitled to the \$2,000 or the plate compactor. *See Lucareli v. Vilas Cnty.*, 2000 WI App 157, ¶11, 238 Wis. 2d 84, 616 N.W.2d 153 (litigant must be given meaningful opportunity to present a defense). Although Brian tried to tell the court that Warren had refused to take possession of the equipment and that the plate compactor needed to be sold in order to pay the corporation’s debts, the court had already made its determination and would not consider Brian’s arguments.

¶23 We conclude the circuit court erroneously exercised its discretion by making its determination before giving Brian an opportunity to offer an explanation or present a defense. *See id.* Accordingly, we reverse the part of the judgment ordering Brian to pay Warren for his property and pay Kevin for the labor. We remand with directions that the court allow Brian an opportunity to explain and present a defense regarding why Warren’s property was not returned, and why, based on any corporate debt, Kevin would not be entitled to his share of the labor for the work completed on Ronald’s house.

¶24 Finally, Brian argues the “trial court erred by not finding that Plaintiff Kevin King’s claim was barred by the statute of limitations.” This argument was not made in the circuit court, and we will not consider it. *See State v. Ndina*, 2009 WI 21, ¶30, 315 Wis. 2d 653, 761 N.W.2d 612 (arguments raised for the first time on appeal need not be considered).

¶25 Neither party is allowed costs on appeal. *See* WIS. STAT. RULE 809.25.

By the Court.—Judgment affirmed in part; reversed in part, and cause remanded with directions.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)4.

